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(3)

No. 01-691

IN THE

SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioners,

vs.

JOE LEONARD LAMBRIGHT,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Respondent asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

[X] Respondent has previously been granted leave to proceed *in forma pauperis* in the following courts:

Pima County Superior Court, Arizona Court of Appeals, Arizona Supreme Court, United States District Court, Ninth Circuit Court of Appeals, Supreme Court of the United States.

[ ] Respondent has not previously been granted leave to proceed *in forma pauperis* in any other court.

Respondent's declaration in support of this motion is attached hereto.

David P. Tiers
35 East University Boulevard
Tucson, Arizona 85705-7736
(520) 623-4274
Attorney for Respondent

31 pp

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Joe Leonard Lambright, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$	$ 0	$
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify):	$ 0	$	$ 0	$
Total monthly income:	$ 0	$	$ 0	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Not Applicable			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Not Applicable			$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
Not Applicable		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
Not Applicable	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
Not Applicable		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

Not Applicable

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ 0	$
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$
Home maintenance (repairs and upkeep)	$ 0	$
Food	$ 0	$
Clothing	$ 0	$
Laundry and dry-cleaning	$ 0	$
Medical and dental expenses	$ 0	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other: _____	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other: _____	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify): _____	$ 0	$
Total monthly expenses:	$ 0	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I have been incarcerated since 1981 and on death row since 1982.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 11/29, 2001

Joe L. Lambright
(Signature)

No. 01-691

In the

Supreme Court of the United States

◆

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

JOE LEONARD LAMBRIGHT,

Respondent.

◆

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

◆

BRIEF IN OPPOSITION

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Attorney for Respondent

QUESTIONS PRESENTED

I

DID THE NINTH CIRCUIT ERR IN ITS DETERMINATION THAT AT THE TIME OF PETITIONER'S DIRECT APPEAL, ARIZONA'S PROCEDURAL DEFAULT RULE WAS NOT SUFFICIENTLY CLEAR TO CONSTITUTE AN ADEQUATE GROUND TO PRECLUDE FEDERAL HABEAS REVIEW?

II

DID THE NINTH CIRCUIT ERR IN ITS DETERMINATION THAT THE STATE COURT DID NOT RELY ON AN INDEPENDENT STATE GROUND TO BAR FEDERAL HABEAS REVIEW?

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IN THE

SUPREME COURT OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully prays that Petitioner's Petition for Writ of Certiorari to review the judgment below be denied.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals appears at Appendix A to the Brief in Opposition and is reported at Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001).

The Decision of the United States District Court of Arizona denying the Amended Petition appears at Appendix B to the Brief in Opposition and is reported at Lambright v. Lewis, 932 F. Supp. 1547 (D. Ariz. 1996).

JURISDICTION

The date on which the Ninth Circuit Court of Appeals decided the case was March 6, 2001.

A Petition for Rehearing and Suggestion for Rehearing En Banc filed by Petitioner was denied by the Ninth Circuit Court of Appeals on May 15, 2001. A copy of the Order denying rehearing appears at Appendix C to the Brief in Opposition.

The jurisdiction of this court is under 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

1. Rule 32.2(a) of the Arizona Rules of Criminal Procedure

Rule 32.2. Preclusion of remedy

a. Preclusion. A petitioner will not be given relief under this rule based upon any ground:

(A) Still raisable on direct appeal under Rule 31 or on post trial motion under rule 24;
(B) Finally adjudicated on the merits on appeal or in any other previous collateral proceeding;
(C) Knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding.

✦

STATEMENT OF THE CASE

On March 30, 1982, a Pima County, Arizona jury found Respondent and his codefendant, Robert Douglas Smith, guilty of the crimes of kidnaping, sexual assault and first degree murder. (App. B). On May 27, 1982 the trial court sentenced Respondent to death on the murder conviction. (Id.) Smith was also sentenced to death. On direct appeal the Arizona Supreme Court affirmed the convictions and death sentences of both defendants. (Id.)

On October 24, 1984, Respondent filed his first Petition for Post-Conviction relief under Rule 32 of the Arizona Rules of Criminal Procedure in state court, alleging *inter alia*, that he had been denied his constitutional right to the effective assistance of counsel at trial and sentencing.. (Id.) On April 17, 1985, the trial court summarily denied Respondent's petition. (App. D.) Thereafter, Respondent filed a motion to rehear the trial court's denial of the Rule 32 petition. The Petition for Rehearing was denied on March 4, 1986. (App. E.) The trial court minute entry orders denying the initial petition and the petition for rehearing later formed the basis for the District Court's determination of procedural bar and are at issue in this Petition. The Arizona Supreme Court

denied review on July 9, 1986.

On April 14, 1987, Respondent filed a Petition for Writ of Habeas Corpus under 28 U.S.C. §2254 in the United States District Court for the District of Arizona in Tucson, Arizona. (App. B.) Because the Petition contained a number of unexhausted claims, the District Court dismissed the Petition without prejudice, but retained jurisdiction and continuing the stay of execution. (Id.) With new counsel, Respondent returned to state court with his second Rule 32 petition. The trial court again summarily denied Respondent's claims. The Arizona Supreme Court denied review on May 14, 1994.

Shortly thereafter, in preparation for the filing of an Amended Petition for Writ of Habeas Corpus, Respondent sought authorization from the District Court for funds to develop Respondent's ineffective assistance of counsel claims. In a series of orders the District Court denied these requests finding that Respondent's claim of ineffective assistance and been procedurally defaulted in state court. (App. B.)

On February 23, 1995, Respondent filed his Amended Petition for Writ of Habeas Corpus in District Court which included the claim of ineffective assistance of counsel raised in the first Rule 32 petition. In an Amended Memorandum Opinion and Order dated July 9, 1996, the District Court denied the Amended Petition, finding Respondent's ineffectiveness claim to have been waived and procedurally defaulted in state, and therefore barred from federal review. (App. B.)

On Appeal to the Ninth Circuit, the court granted relief on one of Respondent's trial claims (dual jury issue), but thereafter granted Petitioner's Motion for Rehearing En Banc and reversed the panel ruling. See, Lambright v. Stewart, 191 F.3d 1181 (9th Cir. 1999). The court then remanded the case to the original panel for consideration of Respondent's remaining claims. Id.

In Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001), the court addressed the merits of

Respondent's ineffective of assistance of counsel claim, finding that at the time of Respondent's direct appeal, Arizona's procedural default rule was "so unclear that it did not provide the habeas petitioner with a fair opportunity to seek relief in state court." The court also found that even if the state procedural rule had clearly existed, "the state court's order ... does not "clearly and expressly" rest on an independent state ground so as to bar federal habeas review. The court found further that Respondent was entitled to an evidentiary hearing because he has raised a colorable claim of ineffective assistance of counsel and no state court had ever granted him an opportunity to develop his claim. (App. A.)

Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc of the decision in Lambright v. Stewart, and that Petition was denied by Order dated May 15, 2001. (App. C.) On August 13, 2001 Petitioner filed a timely Petition for Writ of Certiorari in this Court. The Petition was placed on the docket November 13, 2001.

✦

REASONS FOR DENYING THE WRIT

Respondent respectfully requests this Court to deny the Writ for the following reasons.

I.

THE COURT BELOW PROPERLY CONCLUDED THAT THE PROCEDURAL BAR APPLIED BY THE STATE COURT WAS NOT A REGULARLY ESTABLISHED OR CONSISTENTLY APPLIED RULE.

A. At The Time Of Respondent's Appeal No Arizona Procedural Rule Required Ineffective Assistance Of Counsel Claims To Be Raised On Direct Appeal.

Before a procedural default can be found to bar the implementation of federal constitutional rights, it must be shown that the procedural requirement was both "firmly established and regularly followed." James v. Kentucky, 466 U.S. 341, 348-49 (1984). See also Barr v. City of Columbia, 378

U.S. 146, 149 (1964) (state procedural rules "not strictly or regularly followed" may not bar our review). "Novelty in procedural requirements cannot be permitted to thwart review ...applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-458 (1958). Even if the rule appeared "in retrospect to form part of a consistent pattern of procedures," a state procedural rule cannot be applied if the defendant could not be "deemed to have been apprised of its existence." Id., at 457.

Here, no rule "even remotely satisf[ies] the James requirement . . . that an adequate and independent state procedural bar to the entertainment of constitutional claims [be] firmly established and regularly followed" at the time it was to be applied. Ford v. Georgia, 498 U.S. 411, 424 (1991). As the lower court properly found, at the time of petitioner's appeal, Arizona's procedural law did not require that ineffective assistance of counsel claims be raised on appeal. Lambright v. Stewart, 241 F.3d 1201, 1203 (9th Cir. 2001). In fact, and as recognized by the Ninth Circuit, no such rule has ever existed in Arizona law. Before and after 1983 (when Respondent's direct appeal was decided), competency claims against trial counsel were routinely raised for the first time in state postconviction proceedings, and no findings of waiver or preclusion were made. State v. Nunez, 135 Ariz. 257, 660 P.2d 858 (1983); State v. Thompson, 139 Ariz. 552, 679 P.2d 575 (App. 1984); State v. Gerlaugh, 144 Ariz. 449, 698 P.2d 694 (1985); State v. Stone, 151 Ariz. 455, 728 P.2d 674 (App.1986); State v. Fisher, 152 Ariz. 116, 730 P.2d 825 (1986).[1]

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[1]These cases disprove Petitioner's claim that it "was the regular practice ... to raise ineffective counsel claims on direct appeal..." Petition, p. 15 n.4. While claims of ineffective assistance of counsel were, from time to time raised on direct appeal, in many other cases they were not. Moreover, a "regular practice" may not be a "firmly established and regularly followed" rule at the time of petitioner's purported default requiring ineffectiveness claims to be raised on direct appeal. Ford v. Georgia, 498 U.S. at 423-424.

Nor did the lower court, as Petitioner contends, contradict or implicitly reject Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992)(en banc). As the lower court noted, its holding in Carriger did not control the decision in this case. Carriger was argued and decided on different grounds.

> We were not, however, faced with the same challenge we confronted here: that the paraticular procedural default rule the state court relied on was insufficiently clear, in light of the rule prohibiting claims that relied on evidence outside the record from being raised on appeal, to bar federal review.

Lambright v. Stewart, 241 F.3d at 1204 n. 3.

Moreover, and as explained more fully below, that case addressed an entirely different aspect of Arizona's procedural default rule: whether additional aspects of a claim raised in state postconviction proceedings that had previously been raised on direct appeal were subject to procedural default. Carriger v. Lewis, 971 F.2d at 333. Here, unlike Carriger, no claim of ineffective assistance of counsel was raised on direct appeal. Rather, all ineffectiveness claims were raised for the first time in state postconviction proceedings. Lambright v. Stewart, 241 F.3d at 1203. In addition, and as also set forth more fully below, Carriger rejected state claims that ineffective assistance of counsel at sentencing claims, raised for the first time in state postconviction proceedings, were procedurally defaulted, even though ineffective trial counsel claims had been raised on direct appeal. State v. Carriger, 132 Ariz. 301, 304, 645 P.2d 816, 819 (1982). The lower court's decision does not contradict Carriger v. Lewis, or any other circuit court decision.

Because Petitioner can no cite no case to clearly establish the purported procedural rule requiring ineffective assistance of counsel claims to be raised on direct appeal, it is forced to argue that this Court should grant certiorari and reverse the lower court because 1) Respondent's appellate counsel had "actual notice" that he was required to raise ineffective claims on appeal, and 2) that Arizona had a general procedural rule subjecting all claims, of every type and kind, that were

"[k]nowingly, voluntarily and intelligently not raised ... on appeal" to a finding of waiver. Ariz.R.Crim.P. 32.2(a). These propositions are belied by the facts.

B. Appellate Counsel Did Not Believe That Ineffective Counsel Claims Had To Be Raised On Direct Appeal.

Petitioner's contention that Respondent's appellate counsel had "actual knowledge" that he was required to raise his ineffectiveness claims on direct appeal, but simply "chose not to" raise them, fatally misrepresents the contents of the affidavit at issue. Petition, p. 5. n 2. In fact, appellate counsel said just the opposite:

> [A]t the time of my representation in this case I was not aware of any Arizona state procedural rule requiring that a claim of ineffective assistance of trial counsel must be raised on direct appeal or thereafter be waived and precluded from later review in state or federal court.

App. G (emphasis added).

The language Petitioner relies on from counsel's affidavit to argue otherwise addresses an entirely different point: that had counsel known he was required to raise ineffective claims on direct appeal and "had" he "reviewed" the record in search of such claims, he would have raised counsel's ineffectiveness at trial and sentencing. Id. That statement does not evince counsel's knowledge that a rule required such claims be raised on appeal. As counsel previously unequivocally stated, he "was not aware of any" such rule. That is not surprising, since as the court below properly found, no such rule existed. Lambright v. Stewart, 241 F.3d at 1203.

Petitioner next relies on the District Court's conclusion that counsel's affidavit "indicates that Lambright's appellate counsel knew that ineffectiveness *could* be raised on direct appeal." Petition, p. 5 (emphasis in original). At most, this excerpt suggests that appellate counsel may have been aware that a claim of ineffective assistance of counsel, based on the trial court record, could have been raised on direct appeal. Such awareness is entirely consistent with the belief that no state

procedural rule required such a claim to be raised. Appellate counsel unambiguously stated in his affidavit that "he was not aware of any Arizona state procedural rule requiring that a claim of ineffective assistance of trial counsel must be raised on direct appeal...." (App. G.) Additionally, and as noted by the court below, Arizona law has always been clear that review on direct appeal is limited to matters appearing in the trial court record. Id., 241 F.3d at 1204. Because of this limitation, had Respondent chosen to raise his extra-record ineffectiveness claims on direct appeal, he would have been denied an adequate forum in which to raise his claims. As noted in State v. Zuck, 134 Ariz. 509, 658 P.2d 162, 168 (1982),

> "[W]here the issue of competency of trial counsel has been raised, we have always resolved the matter with whatever was before us in the record and without giving trial counsel an opportunity to be heard."

Moreover, and as also explained above, had counsel decided to raise record-based ineffective trial counsel claims on appeal, any ineffective trial counsel claims discovered in later state postconviction proceedings based on outside record investigation, could be found waived. See State v. Carriger, 143 Ariz. 142, 147, 692 P.2d 991, 996 (1984)(where defendant "intentionally sought substitute appellate counsel in order to raise claims of ineffective assistance of counsel,"and did raise such claims on appeal, defendant found to have knowingly, voluntarily and intelligently waived later ineffective counsel claims discovered in state postconviction proceedings).[2]

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[2]Petitioner misrepresents the lesson of State v. Carriger, supra. See Petition, pp. 14-15. Carriger did not announce or confirm a rule requiring ineffective counsel claims be raised on direct appeal. All Carriger stands for is the unremarkable proposition that if a defendant makes a deliberate decision to raise claims of ineffective counsel on appeal--which it concluded the defendant in Carriger did based on the defendant's specific statements and conduct--other instances of trial counsel's ineffectiveness, even those based on outside record investigation, are subject to a finding that they were knowingly, voluntarily and intelligently waived. State v. Carriger, 143 Ariz. at 147, 692 P.2d at 996. Carriger also makes clear, however, that such a finding of waiver does not reach claims of ineffective sentencing counsel not raised on direct appeal. Id.; State v. Carriger, 132 Ariz. at 304, 645 P.2d at 819.

However, even in that stark setting, where counsel chose to raise a record based ineffective assistance of counsel at trial claim on direct appeal, Arizona law nevertheless permitted the defendant to raise ineffective assistance of counsel at sentencing claims in later state postconviction proceedings. State v. Carriger, 132 Ariz. 301, 304, 645 P.2d 816, 819 (1982)(finding counsel at sentencing to have been ineffective and remanding for a new sentencing hearing, noting that defendant's prior appeal did not raise "inadequate representation at the sentencing," and rejecting state's arguments of procedural bar). Even if this Court were to accept Petitioner's argument that ineffective trial counsel claims were required to be raised on direct appeal, Carriger clearly established that ineffective sentencing counsel claims could be raised for the first time in a later state postconviction proceeding. Id.

C. Arizona's General Procedural Default Rule Did Not Require That Ineffective Assistance Of Counsel Claims Be Raised On Direct Appeal.

Petitioner's second attempt to establish a procedural default where none exists, is to argue that Arizona's general procedural default rule was clearly established by Ariz.R.Crim.P. 32. That attempt fails as well.

Arizona's general procedural default rule in existence at the time of Respondent's direct appeal, did not require that ineffective counsel claims be raised on direct appeal. It stated only, that "any ground" "[k]nowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding" was subject to a finding of waiver. Ariz.R.Crim.P. 32.2(a)(3). As set forth above, ineffective assistance of counsel claims, based on both the trial court record and outside record facts, were not subject to this general waiver rule when raised for the first time in postconviction proceedings. See, e.g., State v. Nunez, supra; State v. Thompson, supra; State v. Gerlaugh, supra; State v. Stone, supra; State v. Fisher, supra. That is not surprising, since review

on direct appeal was limited strictly to matters appearing in the trial court record and, as the lower court and Arizona courts recognize, most successful ineffective counsel claims require an investigation of facts not contained in the appellate record. Lambright v. Stewart, 241 F.3d at 1204; State v. Watson, 114 Ariz. 1, 14-15, 559 P.2d 121, 134-135 (1976), cert. denied, 430 U.S. 986 (1977)(record-based ineffective counsel at trial claim raised on appeal denied, but hearing needed to resolve extra-record allegations of ineffective counsel raised in postconviction proceedings brought under Ariz.R.Crim.P. 32). Additionally, because a record based claim of ineffective trial counsel raised on appeal subjected other allegations supporting that claim based on outside record facts to a finding of procedural default, State v. Carriger, 143 Ariz. at 147, 692 P.2d at 996, prudent counsel would not raise any part of an ineffectiveness claim on direct appeal.

Petitioner's claim that the purported requirement to raise all claims on direct appeal was "not obviated" by the "possibility" that a claim of ineffective assistance might involve matters outside the trial court record, because an appeal could be stayed pending the resolution of a Rule 32 petition, implicitly acknowledges the inconsistency of its own position. Arizona Rule of Criminal Procedure 31.4, did provide that an appellate court could stay an appeal, "while a ... petition under Rule 32 is pending." However, as the lower court fully recognized and as petitioner now tacitly concedes, a postconviction proceeding under Rule 32, rather that a direct appeal, was always the proper forum in which to raise ineffectiveness claims. Lambright v. Stewart, 241 F.3d at 1204. Whatever ambiguity may have existed in the past regarding the appropriate forum in which to raise ineffective assistance of counsel claims was resolved fully by the Arizona Supreme Court in 1989. "If the defendant wishes to raise an ineffective assistance of counsel issue, he should ordinarily begin someplace other than this court." State v. Valdez, 160 Ariz. 9, 770 P.2d 313, 318 (1989).

Nor did the lower court, as Petitioner contends, find that a state rule is not adequate, "unless expressed in a judicial decision applying it to a similar issue." After rejecting the state's continued reliance on State v. Zuck, as support for the contention that such a rule existed, the lower court specifically examined and rejected Petitioner's alternative reliance on Rule 32.2's general procedural default rule. Having fully considered both judicial decisions and Arizona's procedural default rule, there is no conflict with the Ninth Circuit's own decision in Bargas v. Burns, 179 F.3d 1207, 1212 (9th Cir. 1999). Bargas held quite simply, that "where a state procedural rule is sufficiently clear to put a petitioner on notice that he must raise all claims or risk default, the petitioner must raise all claims." (emphasis added.) Arizona's procedural rule was not sufficiently clear, either from judicial decision or black letter law.

As explained above, Arizona's general procedural default rule did not prohibit ineffective assistance of counsel at sentencing claims raised for the first time in state postconviction proceedings, even when ineffective trial counsel claims were raised and decided on direct appeal. See State v. Carriger, 132 Ariz. at 304, 645 P.2d at 819. The review of judicial decisions and Arizona's general procedural default rule clearly demonstrate that the lower court ruling does not conflict in any way with any of this Court's decisions or decisions of other circuit courts.

II.

THE STATE COURT'S PROCEDURAL RULING DID NOT FORECLOSE FEDERAL REVIEW.

A. The State Court's Last Reasoned Opinion Rejected The Incompetent Counsel Claim Because It Had Previously Been Adjudicated On Direct Appeal.

Alternatively, the lower court concluded that even if a procedural default rule clearly existed that required ineffective counsel claims be raised on direct appeal, the state court's order "does not

'clearly and expressly' rest on such a rule." Lambright v. Stewart, 241 F.3d at 1205. In reaching this conclusion, the circuit court did not stray from this Court's settled case law.

The federal court looks to the "last reasoned opinion on the claim" to determine whether a state procedural ruling bars federal review. Ylst v. Nunnemaker, 501 U.S. 797, 804 (1991). The last explained state court judgment must "'clearly and expressly'" rely on an adequate state procedural bar before federal review can be denied. Harris v. Reed, 489 U.S. 255, 263 (1989)(quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)).

The circuit court below properly applied these principles. Lambright v. Stewart, 241 F.3d at 1205. Because the Arizona Supreme Court order denying the petition for review from the trial court's order denying postconviction relief was silent, the circuit court looked at the last reasoned opinion of the state trial court. Id. As all agree, see Petition, p. 17, that opinion was the trial court's order denying Respondent's motion for reconsideration. What the state trial court said about the incompetent counsel claim was this:

> Ineffective assistance of counsel.
> Paragraph a--this issue existed factually prior to appeal; the Arizona Supreme Court looked at the entire sentencing process exhaustively, testing it for error of constitutional dimensions and found none. There is therefore the suggestion, and strong inference, that this claim is precluded under Rule 32.2(a)(2); however, it [sic] not, the Court finds that since it clearly could have been raised on direct appeal, that it has been knowingly, voluntarily and intelligently waived by failure to raise it, and is therefore precluded pursuant to Rule 32(a)(c) and (c).

Id. The state court's first ruling then rests on its finding that a "strong inference" demonstrates that the claim of ineffective sentencing counsel was decided and rejected on direct appeal by the Arizona Supreme Court when it "looked at the entire sentencing process exhaustively." Based on this finding, the state court found this claim "therefore" "precluded" under Ariz.R.Crim.P. 32.2(a)(2). Id. Ariz.R.Crim.P. 32.2(a)(2) bars from further state court review claims that were already "[f]inally

adjudicated on the merits on appeal or in any previous collateral proceeding." Ariz.R.Crim.P. 32.2(a)(2).

The state trial court's determination that the incompetent counsel claim had already been adjudicated on direct appeal, and was thus res judicata, however, is not an independent and adequate state law ground barring federal review. As this Court previously explained, the "effect of such state court rules "on the availability of federal habeas is nil...." Ylst v. Nunnemaker, 501 U.S. 797, 804 n.3 (1991). That is because a state court rule "preventing the relitigation on state habeas of claims raised on direct appeal" is "not a procedural bar in the traditional sense." Bennett v. Whitley, 41 F.3d 1581, 1583 (5th Cir.1994). All such a rule decides is that the state court will not reconsider the same claim previously considered and rejected in an earlier state appeal.

After finding this strong inference that the ineffective counsel claim had been previously adjudicated and denied on the merits (a finding that does not bar federal review), the state court made a second finding: that if the claim were not reviewed on direct appeal as it strongly inferred it was, it would be waived under Ariz.R.Crim.P. "32(a)(c) and (c)." Assuming the state court meant to refer to Ariz.R.Crim.P. 32.2(a)(3), that rule bars claims from state court review that could have been raised earlier but were knowingly, voluntarily and intelligently waived.

As the lower court correctly found, these two simultaneous conclusions are "mixed and inconsistent." Lambright v. Stewart, 241 F.3d at 1206. They are, at best, ambiguous, and do not "clearly and expressly" invoke a procedural bar to federal review. Harris v. Reed, 489 U.S. at 263.

Petitioner first complains that the lower court's holding misapplies Harris v. Reed, 489 U.S. 255, 263 (1989), because the state court ruling "certainly" does not rest on federal law. Petition, p. 18. Petitioner is wrong. The state court's ruling that sentencing counsel's ineffectiveness was "exhaustively" considered and rejected by the Arizona Supreme Court "for error of constitutional

dimensions"does indeed fairly appear to invoke federal law. Arizona reviews claims of incompetent counsel under the Sixth Amendment. See e.g., State v. Lee, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984) (adopting Strickland v. Washington, 466 U.S. 668 (1984) test for reviewing ineffective counsel claims under sixth amendment). Because the trial court found that the claim had already been reviewed and rejected on the merits, the claim could not be adjudicated again. That ruling does not bar federal review. Ylst v. Nunnemaker, 501 U.S. at 804 n.3.

Contrary to Petitioner's argument, the state court's ruling, thus, is entirely unlike that in Coleman v. Thompson, 501 U.S. 722 (1991), where the state supreme court "stated plainly" that it was granting the state's motion to dismiss "based solely on Coleman's failure to meet the Supreme Court's time requirements." Id., at 740. Here, the state court denied Respondent's incompetent counsel claim because it had previously been "exhaustively" reviewed and rejected on direct appeal. The state court rule barring relitigation of claims considered on direct appeal does not prevent federal review. Ylst v. Nunnemaker, 501 U.S. at 804 n.3.

As we have also shown, the circuit court decision also does not misapply Harris. The state court ruling plainly stated its strong inference that the incompetent counsel claim had already been adjudicated on the merits on direct appeal during the state supreme court's "exhaustive[]" review. It then went on to note that if that were not so, then the claim would be barred from review because it was knowingly, voluntarily and intelligently not raised on direct appeal.

Given the strong inference that this claim had already been considered and rejected on the merits, and absent a clear statement that the claim is barred because it was not raised in the direct appeal, federal review is not barred. See Levine v. Torvik, 986 F.2d 1506, 1517 (6th Cir.1993), cert denied, 509 U.S. 907 (1993)(federal review not barred where state court found that "the defendant has waived these claims since he failed to raise them with the trial court. ... Furthermore, this court

in substance addressed and overruled these claims in the defendant's prior appeal...."). The state trial court's language that a strong inference existed that this claim had previously been considered and rejected on the merits is not an "independent state ground" precluding federal review. But even assuming ambiguity in the state trial court's ruling, such ambiguity is insufficient to preclude review of this claim. Coleman v. Thompson, 501 U.S. at 735. See also, Tankleff v. Senkowski, 135 F.3d 235, 247 (2nd Cir. 1998)(state trial court ruling that the defendant's contentions are "either meritless or unpreserved" is not a clear and express statement that the judgment rests on procedural bar precluding federal review).

B. The State Court's Second To Last Reasoned Opinion Rejected The Incompetent Counsel Claim Because It Was Meritless.

Realizing the consequences of the state court's last reasoned opinion finding the incompetent counsel claim had previously been adjudicated and rejected on direct appeal, Petitioner changes positions and argues that the court below should have considered the state trial court's second to last reasoned order denying relief on the incompetent counsel claim. Petition, p. 21. Of course, that is not what Ylst requires. But even a review of that order does not help Petitioner.

In the first order denying relief on this claim, the trial court clearly rejected the claim on the merits. After discussing the allegations of the claim, it found it "[t]he ineffective claim is not a colorable claim." (App D.) Under Arizona law, a claim is colorable if assuming "defendant's allegations are true," they "might have changed the outcome." State v. Watton, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990) (citing State v. Schrock, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986)). See also Ariz.Crim.P. Rule 32.6. That, of course, is a clear and express ruling on the merits.

The state court's later passing mention of a procedural default based on the failure of appellate counsel to raise the claim on direct appeal does not change its earlier ruling expressly

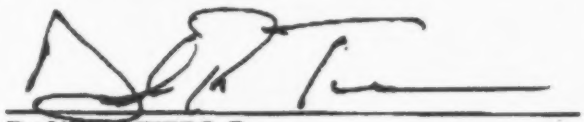
rejecting the claim on the merits. The procedural ruling is plainly an alternative one that does not preclude federal review. See Jenkins v. Nelson, 157 F.3d 485, 491 (7th Cir. 1998), cert. denied, 527 U.S. 1039 (1999)(no procedural default occurs if the state court's alternative finding constituted a finding on the merits.); where it is unclear if the state court dismissed the petition because of a state law procedural default or on the merits of the petitioner's federal constitutional claims, federal review of a claim is not precluded). Here, the alternative finding was plainly an afterthought. The state court's decision "rested primarily on resolution" of the incompetency claim. Coleman v. Thompson, 501 U.S. at 735.

But of course it is to the state court's last reasoned opinion to which the federal courts must look, as the court below did here. That opinion rejected the state court's earlier mention of procedural default for failing to raise the claim on direct appeal. It found instead a strong inference that the claim had in fact been considered and rejected on the merits by the state appellate court in the direct appeal. It is that court's final word on which the circuit court below reasonably and rightly relied, following the mandates of Harris, Ylst and Coleman.

CONCLUSION

For all these reason, certiorari must be denied. Nothing about the panel's analysis is either incorrect or exceptional, and nothing contravenes this Court's decisions or that of other circuit courts. The panel's conclusion remanding this case for an evidentiary hearing applied settled principles to the facts here and was correct. Certiorari should be denied. See U.S.S.Ct.R. 10.

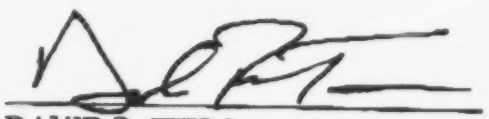
RESPECTFULLY Submitted this 13 Day of December, 2001.



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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 2001, I caused the Respondent JOE LEONARD LAMBRIGHT's Brief in Opposition to be served by causing one copy of the brief to be mailed, postage pre-paid, to **Bruce Ferg, Assistant Arizona Attorney General, 400 West Congress Street, Suite S-315, Tucson, Arizona, 85701,** counsel for the petitioner.



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